Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 87-767

# In the
# Supreme Court of the United States

OCTOBER TERM, 1987

AMINA SOLIMAN,

*Petitioner,*

v.

EBASCO SERVICES, INC.,

*Respondent.*

## Respondent Ebasco Services Incorporated's Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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*Attorneys for Respondent*

## Counter-Statement of Questions Presented

1. Was it error for the United States Court of Appeals to dismiss appellant's appeal arising out of the District Court's denial of attorney's fees and limitation of the award of prejudgment interest to appellant for lack of standing and to award sanctions against appellant's attorney?

2. Was it error for the United States Court of Appeals not to reverse the District Court's denial of attorney's fees and limitation of appellant's award of prejudgment interest?

3. Should respondent be awarded damages because appellant's petition for certiorari is frivolous?

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## Respondent Ebasco Services Incorporated's Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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Respondent, Ebasco Services Incorporated ("Ebasco"), respectfully submits the following Brief in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

### Opinions Below

Appellant's initial application for an award of attorney's fees and prejudgment interest was denied by United States District Judge Thomas P. Griesa of the District Court for the Southern District of New York in an order and opinion dated February 3, 1987 (85 Civ. 3201) (A38-44).

Appellant's appeal to the United States Court of Appeals on the issues of attorney's fees and prejudgment interest was dismissed with sanctions awarded against appellant's counsel to be paid to respondent[1] after consideration by Circuit

[1] Appellant's counsel has not yet paid the sanctions or respondent's costs of the appeal to the Second Circuit.

Judges Lumbard, Meskill and Cardamone in an opinion written by Judge Cardamone dated June 30, 1987, 822 F.2d 320 (2d Cir. 1987). (A-1-19).

Subsequently, appellant's application to the Court of Appeals for rehearing *en banc* was denied on September 3, 1987. (A-50-51).

## Counter-Statement of Case

The petition for a writ of certiorari in this docket seeks review of a decision by the United States Court of Appeals for the Second Circuit, reported at 822 F.2d 320 (2d Cir. 1987) in an insignificant sex discrimination case brought under the Civil Rights Act of 1964, Title VII, 42 U.S.C. §§ 2000 *et seq.* by Amina Soliman against Ebasco[2] tried to a jury verdict in the United States District Court for the Southern District of New York, 85 Civ. 3201 (TPG). The merits of the underlying case are not before this Court, nor were they before the Circuit Court, for the only issues raised on appeal were the District Court's denial of plaintiff's counsel's application for an award of attorney's fees and the District Court's determination of the time period during which prejudgment interest accrued. (*See* A-38-43 and A-46).

The Circuit Court, in its decision of June 30, 1987, (A-1-19), while approving the District Court's denial of the application for attorney's fees (A-15-16), focused primarily on the conduct of plaintiff's counsel in prosecuting an appeal without his client's consent[3] and, indeed, contrary to her expressed desire (A-9-10-12) and his proffer to the Circuit Court at oral argument of the appeal of documents that were

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[2] The respondent herein, Ebasco Services Incorporated, is a wholly-owned subsidiary of ENSERCH Corporation, 300 South St. Paul, Dallas, Texas 75201. The corporate affiliates of respondent are enumerated in Respondent's Appendix ("RA") at 1-2.

[3] It is, in view of petitioner's counsel's prior conduct, not really surprising that the document central to the Circuit Court's decision is not part of his appendix. We submit it in our appendix (at RA 3-4).

not part of the record and ". . . his attempt to file numerous and mostly irrelevant papers since oral argument." (A-16).

The petition for certiorari before this Court is a hopelessly confused, largely unintelligible and mostly irrelevant mass of verbiage which does little to enlighten the Court or respondent as to the issues petitioner's counsel wishes this Court to decide. The argument in the petition addresses the questions of attorney's fees, prejudgment interest and sanctions imposed pursuant to Appellate Rule 38, but also addresses the merits of the case below as to which no appeal was taken (*see, e.g.*, Petition, at 8,9). Indeed, petitioner's counsel even includes in his appendix documents generated in an Equal Employment Opportunity Commission proceeding (A-52-A-72) which were not part of the record on appeal to the Second Circuit and which were offered but excluded at trial.[4]

We respectfully submit that this Court's perusal of the petition will satisfy the Court that the decisions of the Court of Appeals for the Second Circuit and of the United States District Court for the Southern District of New York were, if anything, benign and restrained in their comments on petitioner's counsel's performance and conduct.

## REASONS FOR DENYING CERTIORARI

### Summary of Reasons

Appellant's petition for certiorari should be denied because the dismissal of the appeal below for lack of standing and the imposition of sanctions on counsel for appellant, together with the Circuit Court's approval of the District Court's denial of attorney's fees and the award of limited prejudgment interest do not raise any special or important reasons for the Court to hear this matter pursuant to Rule 17 of the Supreme Court Rules. This matter does not involve a decision by a federal court of appeals which is in conflict with a decision of another federal court of appeals on the

[4] Respondent objects to their inclusion in the Appendix of this docket.

same matter, nor does it involve a departure from the usual course of judicial proceedings by a federal court of appeals, or the sanctioning by a federal court of appeals of a departure by a district court from the usual course of judicial proceedings. Nor does this matter involve an important question of federal law which should be settled by the Court. The comparative insignificance of the issues raised in the petition together with the chaotic and unthoughtful nature of appellant's petition highlight the vexatious and protracted efforts of counsel for appellant in this frivolous appeal, warranting the imposition of damages and costs.

## I

### The Court should deny the Petition for Certiorari because the issues raised by the Circuit Court's dismissal of the appeal and the imposition of sanctions are not special and important.

The Circuit Court's determination that counsel for appellant lacked standing to pursue the underlying appeal, the imposition of sanctions on counsel for appellant and the dismissal of the appeal with regard to the issues of attorney's fees and prejudgment interest do not raise issues which are special, significant or important to anyone other than the parties directly involved in this matter. Under these circumstances this Court should not be burdened by the instant petition. Sup. Ct. R. 17. *Rice v. Sioux City Cemetery*, 349 U.S. 70, 99 L.Ed. 897, 75 S.Ct. 614 (1955); *see, Fields v. United States*, 205 U.S. 292, 51 L.Ed. 807, 27 S.Ct. 543 (1906).

Considerations generally relied upon by this Court in determining whether to grant or deny a petition for a writ of certiorari are stated in Rule 17 of the Supreme Court Rules, which provides in pertinent part:

1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special or important reasons therefor.

The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

* * *

(c) When a state court or federal court of appeals has decided an important question of federal law which has not been, but should be settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

The Circuit Court's decision was a valid exercise of its judicial discretion as a matter of law. Appellant's petition does not contain any coherent challenge to the Circuit Court's holding, nor does it establish in any way that the holding was inconsistent with the rulings of the other federal courts of appeal. Nor does the petition indicate that the decisions below dealt with a federal question of any significance. The Circuit Court's ruling on counsel's standing to appeal and the imposition of sanctions upon him is clearly of no import or significance to anyone but himself.

The petition does not directly address any of the bases for the Circuit Court's holding that counsel for appellant was without standing to appeal the court's denial of attorney's fees. A review of legal principles relied upon by the Second Circuit will highlight their soundness and the impropriety of appellant's whirlwind of confusing assertions.

The Circuit Court began with the premise that attorney's fees in a Title VII action are the plaintiff's entitlement and not her attorney's. *Oguachuba v. I.N.S.*, 706 F.2d 93, 97, 98 (2d Cir. 1983); *Clark v. Marsh*, 609 F.Supp. 1028, 1030 (D.D.C. 1985). *See Evans v. Jeff D*, 475 U.S. 747, 106 S.Ct. 1531, 1538-40 and n. 19, 89 L.Ed. 747 (1986) and *Moore v. National Ass'n of Securities Dealers Inc.*, 762 F.2d 1093, 1099 n.10 (D.C. Cir. 1985). Appellant's petition in no way confronts this precedent.

The real issue regarding counsel for appellant's standing to pursue the underlying appeal hinges upon the conduct of counsel for appellant during the course of the appeal. Plaintiff-appellant had contacted the District Court expressing a clear desire not to pursue an appeal. (See RA-3-4). Appellant's counsel subsequently pursued the appeal, although he was on notice of his client's wishes. (See RA-3-4). At oral argument of the appeal he produced an assignment and satisfaction dated *after* the date of respondent's reply brief. Subsequently, after oral argument at which his standing was challenged by respondent's counsel and the Court, he attempted to submit additional evidence, all of which postdated the oral argument and which was utterly self-serving.[5]

Clearly, the conduct of counsel for appellant *vis a vis* his client is of no consequence beyond this action and does not present a federal question. No writ of certiorari should be issued by this Court.

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[5] We note also that counsel's purported authority to pursue the appeal was conditioned on his appealing the denial of punitive damages (See A-24), which was not even an issue on the appeal. At the very least, appellant was misinformed as to the very limited potential benefit to her in pursuing an appeal limited to the issues of denial of attorneys fees and the amount of prejudgment interest.

## II

**The Circuit Court did not depart from settled law and no significant federal question is implicated.**

The affirmance of the decision of the District Court denying plaintiff counsel fees and limiting the amount of pre-judgment interest was not a departure from the settled law in this area and does not raise a significant federal question which is of importance to anyone beyond the parties directly involved in this action and counsel for appellant.

The petition for certiorari is fatally defective because the discussion of the denial of attorney's fees does not establish that such denial constituted an abuse of discretion by the District Court or the Circuit Court.

It is well-settled that attorney's fees under 42 U.S.C. 2000e 5(k) are discretionary, not mandatory. *Zarcone v. Perry*, 581 F.2d 1039 (2d Cir. 1978), *cert. denied* 439 U.S. 1072, 59 L.Ed.2d 38, 99 S.Ct. 843 (1979); *Moore v. National Ass'n of Securities Dealers, Inc.*, 762 F.2d 1093 (2d Cir. 1985). It is similarly well-settled that the standards to be applied by a district court in determining whether an award of attorney's fees are appropriate are those enumerated in *Hensley v. Eckerhart*, 461 U.S. 424, 430, n. 3, 76 L.Ed.2d 40, 103 S.Ct. 1933 (1983).[6] *See, New York Ass'n for Retarded Children v. Carey*, 711 F.2d 1136 (2d Cir. 1983).

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[6] Twelve factors were enunciated in *Hensley*, three of which are telescoped into (i) and are as follows:

(i) the time and labor required, the novelty difficulty of the questions involved and the skill required to perform the legal services properly;

(ii) the likelihood, if apparent to the client, that the acceptance of the case will preclude other employment by the lawyer;

(iii) the fee customarily charged in the locality for similar legal services;

(*footnote continued on following page*)

Appellant's petition for certiorari does not even acknowledge, let alone substantively contest or challenge, the discretionary standard applied by the District Court. The criteria which the District Court relied upon were those set forth in controlling precedent, and the District Court's application of those criteria to the facts of the case and the conduct of the litigation was well-reasoned. Appellant's petition randomly cites and relies upon cases from multiple jurisdictions on narrow points which appellant deems favorable but without reference to any coherent standard. Such an approach is particularly inappropriate and unpersuasive where, as here, attorney's fees are a discretionary matter to be determined on a case-by-case basis by the trial court.

Appellant fails utterly to show that the District Court applied an incorrect or improper standard in adjudicating appellant's application for attorney's fees or that the District Court abused its discretion in applying that proper standard. On the contrary, the Court of Appeals succinctly disposed of appellant's claim by noting appellant's counsel's abject failure to furnish the District Court with "contemporaneous time records, which for many years have in [the Second] Circuit been a prerequisite to obtaining any court-ordered attorney's fees. *Lewis v. Coughlin*, 801 F.2d 570, 577 (2d Cir. 1986). *New York Ass'n for Retarded Children*, 711 F.2d 1136, 1148 (2d Cir. 1983); *McCann v. Coughlin*, 698 F.2d 112, 131 (2d Cir. 1983)." (A-16)

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*(footnote continued from preceding page)*

(iv) the amount involved and the results obtained;

(v) the time limitations imposed by the client or the circumstances;

(vi) the nature and length of the professional relationship with the client;

(vii) the experience, reputation and ability of the attorney performing the services;

(viii) whether the fee is fixed or contingent,

(ix) awards in similar cases.

Appellant's petition is conspicuously lacking in any challenge of this basis for affirming the denial of appellant's application for attorney's fees. The denial of attorney's fees in this case is not an issue warranting consideration by this Court.

Appellant's discussion regarding the District Court's prejudgment interest award is similarly unpersuasive and fails to establish that this matter warrants the issuance of a writ of certiorari.

Appellant does not appear to contest the fact that prejudgment interest is discretionary in Title VII cases but relies upon case law from various courts to the effect that prejudgment interest should be awarded to make the plaintiff whole. However, appellant does not attempt to show that Judge Griesa abused his discretion in limiting the award of prejudgment interest to the plaintiff. Once again, the standard applied by the courts below is not contested by the appellant and appellant has failed to show that the standard was misapplied in any way. With no dispute as to the applicable standard, this question as presented in this case does not merit review on a grant of certiorari. *Rice v. Sioux City Cemetery, supra, see Fields v. United States, supra.*

None of the issues raised in appellant's petition warrant consideration by this Court. As this Court stated in *Rice v. Sioux City Cemetery,*

> [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeals.

349 U.S. at 79, 99 L.Ed. at 904 (citations omitted).

These criteria are wholly absent in this case.

## III

**Respondent should be awarded damages because the petition is frivolous.**

Rule 49.2 of the rules of this Court provides:

> "When an appeal or petition for writ of certiorari is frivolous, the Court may award the appellee or respondent appropriate damages."

We respectfully submit that the petition on its face reveals its frivolous, vexatious and burdensome nature. Petitioner's counsel persists in the very sort of conduct the Circuit Court found unacceptable, and his petition is so devoid of merit or even coherent argument that it visits an unnecessary burden on the Court and respondent.

Under the authority of Rule 49.2 and 28 U.S.C. §1927, respondent respectfully requests the imposition of damages of $3,000 plus double costs as partial compensation for the inconvenience and financial burden inflicted by the frivolous petition herein.

## CONCLUSION

**For the foregoing reasons, the petition for certiorari should be denied.**

Dated: December 9, 1987

Respectfully Submitted,

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(212) 751-2900

*Attorneys for Respondent*

## Subsidiaries of Ebasco Services Incorporated

E & L Technologies Inc.
Ebasco Constructors Inc.
Ebasco Corporation
Ebasco Energy Resources, Inc.
Ebasco Engineering and Construction Corporation
Ebasco Industries Inc. (Delaware)
Ebasco International Corporation
Ebasco Overseas Corporation
Ebasco Plant Services Inc.
Ebasco Risk Management Consultants, Inc.
Ebasco Services International Inc.
Ebasco Services of Canada Limited
ENS Equipment Corporation
Hittman Ebasco Associates Inc.

## Divisions of Ebasco Services Incorporated

Ebasco Business Consulting Company
ENS Advanced Technologies Company
Envirosphere Company

## Subsidiaries of Ebasco Risk Management Consultants, Inc.

Associated Company Management of Ebasco Limited
Associated Company Management of Ebasco (Cayman) Limited
Independent Employee Consultation Services of Ebasco Inc.

## Subsidiaries of Ebasco Industries Inc. (Delaware)

Ebasco Australia Pty. Limited
Ebasco B.V.
Ebasco Cayman Limited
Ebasco Deutschland Gmbh
Ebasco Energy A.G.
Ebasco V.I. Inc.
Enserch Engineers & Constructors, Inc.
Industrial Assistance Corporation

**Subsidiary 80% Owned by Ebasco Industries Inc. (Delaware)**

Ebasco Dorsch Consultants Inc.

**Subsidiaries of E & L Technologies Inc.**

E & L Associates, Inc.
E & L Engineering Inc.
E & L International, Inc.

**Subsidiary of Ebasco Australia Pty. of Limited**

Ebasco Energy Pty. Limited

**Subsidiary of Ebasco Cayman Ltd.**

Ebasco Services Singapore Pte. Ltd.

**Subsidiary of Ebasco B.V.**

Ebasco Italia S.r.l.

**Mexican Corporation 49% owned by Ebasco Overseas Corporation**

Ebanal, S.A. de C.V.

**Subsidiary of Ebanal, S.A. de C.V.**

Ebaser, S.A. de C.V.

**Limited Liability Partnership 50% owned by Ebasco Cayman Limited**

Ebasco Arabia Limited

**Spanish Company 50% Owned by Ebasco Energy A.G.**

Ebasco Espana, S.A.

**Republic of China Corporation 60% Owned by Ebasco Industries Inc. (Delaware)**

Ebasco-CTCI Corporation

## Letter from Petitioner to Judge Griesa

February 16th 1987

Mr. Michael Cohen, Esq.
Judge Thomas F. Garsie
Chambers
U.S. District Judge
Southern District of New York
Foley Square, NY, NY 10007

Re: Soliman v. Ebasco Services Incorporated

Dear Mr. Cohen

Inclosed is a copy of Mr. Ghobasy letter to file for apeal

Please be advised that:

(1) Mr. Ghobashy filed for the apeal tottaly in his own with out my permission!

(2) I accept Judge Thomas Garsie Judgment (please send a copy of it.) and I am not interested in the apeal.

Thank you &

Sincerely yours
*/s/ A. Soliman*
Amina A. Soliman
14 Beverly Rd.
Old Bridge N.J. 08857
(201) 390-9526

a copy will be sent
To: Mr. Omar Z. Ghobashy

P.S.
Please advise me if I need to
write any body else besides yourself &
to stop Mr. Ghobashy action of appeal?

**Memorandum from Judge Griesa to Petitioner's Counsel**

MEMORANDUM

To: Counsel
Mrs. Amina A. Soliman

FROM: Judge Griesa

RE: *Soliman v. Ebasco* (85 Civ. 3201)

DATE: February 19, 1987

I am sending the two attorneys a copy of a letter which I received today from Mrs. Soliman. She indicates that the notice of appeal filed by Mr. Ghobashy, dated February 11, 1987, was without her authorization.

The District Court has no further jurisdiction, now that a notice of appeal has been filed. Any further steps in the matter will need to be taken in the Court of Appeals. If Mrs. Soliman requires any information personally about what action to take, inquiry may be made to

Office of the Clerk
United States Court of Appeals
United States Courthouse
Foley Square
New York, N.Y. 10017

Thomas P. Griesa